Filed 4/12/10 P. v. Jameson CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WAYNE ANTHONY JAMESON, Defendant and Appellant.	A125103 (Mendocino County Super. Ct. No. SCUKCRCR0886032)

Appellant, Wayne Anthony Jameson, was on October 30, 2008 charged by the Mendocino County District Attorney with transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)[1]–count one); possession of marijuana for sale (§ 11359–count two); receipt of proceeds from the sale of marijuana in excess of $25,000 (§ 11370.9, subd. (a)–count three); and knowingly transporting or engaging in a transaction of anything of value which said person knowingly intended to be used for the purpose of violating any provision of Division 10 or 10.1 of the Health and Safety Code with the intent to conceal or disguise the nature, location, ownership, control or source of the proceeds or to avoid a transaction reporting requirement under state or federal law (§ 11370.9, subd. (b)–count four). Appellant entered a plea of not guilty on December 9, 2008.

On February 9, 2009, appellant moved to suppress evidence (Pen. Code, § 1538.5), and the court heard and denied the motion on February 25. That same day, on

[1] All subsequent statutory reference are to the Health and Safety Code unless otherwise indicated.

the basis of a negotiated disposition, appellant pled nolo contendere to count two (possession for sale), and the court dismissed the three remaining counts on the recommendation of the district attorney.

On May 12, 2009, the court suspended imposition of sentence and placed appellant on probation for three years subject to the condition, among others, that he serve two months in county jail.

The appeal of a final judgment of conviction after a plea of no contest to a felony offense after denial of a motion to suppress pursuant to section 1538.5 is appealable. Timely notice of such an appeal was filed on June 5, 2009.

FACTS AND PROCEEDINGS BELOW

The relevant facts were elicited at the February 25, 2009 hearing on appellant's motion to suppress.

Ukiah Police Officer Peter Hoyle testified that at about 3:00 p.m. on August 6, 2008, while he was assigned to the Mendocino Major Crimes Task Force, he was driving north on Highway 101 toward Willits in an unmarked vehicle. He saw a Chevrolet pickup truck with Utah license plates travelling in the same direction in excess of 70 miles per hour and weaving in and out of lanes to pass vehicles. As the truck neared Willits, where the two northbound lanes merged into a single lane, Hoyle saw the pickup close to one or two car lengths behind a Ford SUV while travelling at speeds of 50 to 60 miles per hour. The driver, who was later identified as appellant, was also holding a cell phone to his left ear. Due to his observations of these violations of the Vehicle Code, Officer Hoyle telephoned Willits Police Sergeant Jacob Donahue and reported what he had seen. Hoyle did not himself make the traffic stop because he was then operating "in a plainclothes capacity" and knew drivers became "apprehensive" when asked to stop by "a guy driving a little pickup truck . . . with facial hair and . . . dangling a red light in the window without a uniform."

Sergeant Donahue testified that after receiving Hoyle's call he drove to the south side of Willits and parked on Margie Drive near South Main Street, which was also Highway 101. When he saw the pickup pass by he followed it for a few blocks, activated

his emergency equipment, and appellant pulled over. Donahue stated that he did not see appellant violate any provision of the Vehicle Code, except that appellant was holding a cell phone in his left hand. When he told appellant he had been seen talking on a cell phone while driving, appellant admitted he was but said he did not know it was unlawful in California to talk on the phone while driving. At that point, Donahue returned to his vehicle to check on appellant's Utah driver's license and insurance papers.

By that time, Deputy Sheriff Wyant had arrived on the scene as a back up. Before Donahue reached his vehicle, Officer Wyant advised Donahue of "something." Donahue then returned to appellant to confront him with the information he had been given; namely, that his truck smelled of marijuana. Donahue asked appellant whether there was any marijuana in his truck and appellant answered that "there was about 20 pounds boxed . . . in the back of the vehicle." After asking appellant to exit his vehicle, Donahue asked him if there was any large amount of cash in the vehicle. Appellant estimated that there was about $50,000.

Donahue's search of appellant's car disclosed three large taped boxes with packages of marijuana in the bed of the truck and a locked pouch in the cab behind the passenger seat, which felt as though it contained money. It was found to contain between $50,000 and $55,000.

Appellant testified that he was especially cautious about his speed because of the contraband he was carrying. He did not remember passing anyone while travelling down the hill into Willits, was not speeding, and had not received a speeding ticket in 10 or 15 years. Appellant disputed Officer Hoyle's testimony that he clocked appellant travelling at 70 miler per hour. Appellant was sure Officer Hoyle was mistaken because he was then on cruise control which, in order to monitor his speed, he had set at 63 miles per hour. Appellant allowed that he had never had the cruise control on the truck checked for accuracy, so he could not say for certain that he was travelling at less than 65 miles per hour, but he "believed" he was travelling within the speed limit. He also stated that he was not following another vehicle too closely as he entered the south side of

Willits, or in the center of Willits when he noticed Officer Donahue's patrol car pull behind four cars that were immediately behind his truck.

Shortly after he noticed Donahue's patrol car, the four cars between them dispersed and Officer Donahue pulled immediately behind him with flashing lights. Appellant pulled into a parking lot, Donahue parked behind him, and Donahue approached his car and asked to see his license and registration, which appellant provided. Donahue told appellant he pulled him over because "an officer from Ukiah in Ukiah saw you on the phone." Appellant told Donahue that he was talking on the phone, but only when parked "on the side of the road," not while driving. At that point, Donahue asked for his driver's license and insurance. Donahue returned to his car, came back "about a minute and-a-half later, two minutes later, and opens my door and says 'get out of the vehicle. My partner smelled marijuana in the back of your truck and you need to get out of the vehicle.' " After appellant alighted from his car and tied his dog to a nearby fence, Donahue handcuffed appellant and told him to sit down on the curb. Appellant never saw the "partner" to whom Donahue referred.[2]

According to appellant, Officer Donahue then opened two of the boxes in the back of appellant's truck, asked how many pounds of marijuana were in the truck, and appellant told him that there was 20 pounds, but "they weren't mine." When Donahue asked whether there was any money in the truck, appellant told him "50 grand" was behind the seat. Appellant was then arrested.

On cross-examination, when asked whether he was holding his cell phone in his hand when he was stopped, appellant stated that he "[didn't] remember that exactly. . . . [¶] I had to get my wallet out of my back pocket and . . . I always get my wallet out of my back pocket with my left hand. So I doubt that I had the cell phone in my left hand. I might have had it between my legs, but I'm not . . . 100 percent positive." Appellant said he was not then talking on his cell phone, nor was he doing so at anytime while

[2] Defense counsel then stated that this testimony "is being offered just—not for the truth of the matter stated, your Honor. This is the conversation that happened and I'm not offering it for the truth."

driving between Ukiah and Willits, nor at that time did he even have his cell phone in his hand.

Appellant also testified that the truck he was driving did not belong to him. He planned to come to California (apparently from Utah) to help a friend remodel his house, and, because the transmission on his own truck was broken and being repaired, he borrowed the pickup he was driving from a friend who allowed him to do so if he independently insured it for the time he used it, which appellant did. The insurance had been in effect for four days at the time of his arrest. Appellant acknowledged that a vehicle set on cruise control could be accelerated to speeds higher than the set speed.

At the conclusion of the suppression hearing, the trial court concluded that the traffic stop was valid and the search reasonable within the meaning of the Fourth Amendment, and on those grounds denied the motion to suppress. As to the validity of the stop, the court found that Officer Hoyle, who testified in court, observed three Vehicle Code violations: speeding, following too closely, and using cell phone while driving,[3] which eliminated "a *Harvey-Remers* situation"[4] and justified the detention.

As to the validity of the search, the court concluded that the detention was based on the information Officer Donahue received from Officer Hoyle, and the search was prompted by the "information" Donahue received from "an officer" (i.e., Officer Wyant), which "led him to ask Mr. Jameson if he had marijuana in the vehicle. And Mr. Jameson was straightforward about that, . . . and the officer, based on the smell, does have a right to search the vehicle." The court also concluded that the search and arrest all took place

---

[3] With respect to the cell phone, the trial judge stated that "I do believe Officer Donahue's testimony that the cell phone was in his hand when he came up to him in the truck, although he didn't see him talking on it."

[4] See *People v. Harvey* (1958) 156 Cal.App.2d 516, 523-524 (*Harvey*) and *Remers v. Superior Court* (1970) 2 Cal.3d 659, 666 (*Remers*), which are two-thirds of a trilogy of cases that also includes *People v. Madden* (1970) 2 Cal.3d 1017, 1021 (*Madden*), which stand for the proposition that, while officers in the field may make arrests on the basis of information furnished them by other officers, " 'the People must prove that the source of the information is something other than the imagination of the officer who does not become a witness.' " (*Remers*, at p. 666.)

"within a couple of minutes" of the stop and the detention was therefore not unduly prolonged.

DISCUSSION

We review the challenged ruling under the substantial evidence standard; however, whether the relevant law has been violated is a mixed question of law and fact subject to independent review. (*People v. Ayala* (2000) 24 Cal.4th 243, 279; *People v. Hoyos* (2007) 41 Cal.4th 872, 891.)

Arizona v. Gant

Appellant's chief argument is predicated on the majority opinion for the closely and complexly divided court in *Arizona v. Gant* (2009) 556 U.S. ___, 129 S.Ct. 1710 (*Gant*),[5] which had not been decided at the time appellant's suppression motion was denied. Because it marks a significant change in Fourth Amendment jurisprudence relating to vehicular searches, *Gant* warrants an extended examination.

Prior to *Gant*, *New York v. Belton* (1981) 453 U.S. 454 (*Belton*) set forth what many considered a bright line rule permitting warrantless searches of the passenger compartment of an automobile incident to the lawful arrest of an occupant *regardless of the danger to the arresting officer posed by the arrestee or the risk that the arrestee might destroy evidence*. As stated in *Belton*, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (*Id.* at p. 460, fns. omitted.) This statement in *Belton* was "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." (*Gant, supra*, 129 S.Ct. at p. 1718.) Later, in *Thornton v. United States* (2004) 541 U.S. 615 (*Thornton*), the high court

[5] The majority opinion in *Gant* was written by Justice Stevens and joined in by Justices Scalia, Souter, Thomas and Ginsburg; Justice Scalia filed a separate concurring opinion, Justice Breyer filed a dissent, and a dissenting opinion was also filed by Justice Alito that was joined in by Chief Justice Roberts, Justice Kennedy and, in part, Justice Breyer.

extended application of the *Belton* rule to situations in which an officer does not make contact with the arrestee until after he or she has left the vehicle. (*Id.* at p. 617.)

Belton and *Thornton* were, however, difficult to reconcile with the earlier landmark opinion in *Chimel v. California* (1969) 395 U.S. 752 (*Chimel*), which "held that a search incident to arrest may only include 'the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' . . . That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. . . . If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." (*Gant, supra*, 129 S.Ct. at p. 1716.)

Belton was thought by many lower courts to mark a retreat from *Chimel*. As Justice Stevens noted in *Gant*, *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. This reading may be attributable to Justice Brennan's dissent in *Belton*, in which he characterized the Court's holding as resting on the 'fiction . . . that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car.' [Citation.] Under the majority's approach, he argued, 'the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car' before conducting the search. [Citation.]" (*Gant, supra*, 129 S.Ct. at p. 1718.)

The question presented in *Gant* was whether, as many lower federal and state courts believed, *Belton* permitted a search of a vehicle incident to the arrest of a driver or passenger even if the arrestee had been secured and denied access to the vehicle. Reading *Belton* more narrowly than had many state and federal courts, the Supreme Court held it did not. *Gant* holds "that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot

access the interior of the vehicle." (*Gant, supra,* 129 S.Ct. at p. 1714.) The *Gant* majority also concluded "that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." (*Ibid.*)

Explaining the majority's rationale, Justice Stevens began by noting that the State's argument "seriously undervalues the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home [citation], the former interest is nevertheless important and deserving of constitutional protection [citation]. It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." (*Gant, supra,* 129 S.Ct. at p. 1720, fn. omitted.)

Justice Stevens felt the State not only undervalued these privacy concerns, but also "exaggerates the clarity that its reading of *Belton* provides," noting that *Belton* has "generated a great deal of uncertainty, particularly for a rule touted as providing a 'bright line.' [Citation.]" (*Gant, supra,* 129 S.Ct. at pp. 1720-1721.)

Finally, Justice Stevens maintained that "a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests. Under our view. *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 463 U.S. 1032 . . . (1983), permits an

officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.' [Citations.] If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-821 . . . (1982), authorizes a search of any area of the vehicle in which the evidence might be found." (*Gant, supra*, 129 S.Ct. at p. 1721.)

As *Gant* had not been decided at the time appellant's suppression motion was denied, the trial court found that the search was reasonable based on the *Belton* rule; that is, because it was incidental to a valid detention.

The first prong of appellant's challenge to the search—which emphasizes that he "had been ordered out of the truck, handcuffed, and was sitting on a curb, removed from the immediate vicinity of the truck such that he had no access to it, and was under the control of [Officer] Donahue, secure and no threat to Donahue"—rests on *Gant*. Because neither officer safety nor the destruction of evidence were at risk, appellant maintains the warrantless search was unreasonable and the evidence it produced must be suppressed.

The *Remers-Madden-Harvey* Rule is Inapplicable

The second, and much more problematical, prong of appellant's challenge to the search takes issue with the trial court's conclusion that the rule described in the *Remers-Madden-Harvey* trio of cases is inapplicable. As earlier noted (see, *ante*, at p. 5), the trial court concluded that because Officer Hoyle testified in court that he had himself observed three Vehicle Code violations that had been reported by him to Officer Donahue, there was no "*Harvey-Remers* situation" and the detention was valid. As appellant points out, he challenges *the search*, not the detention, and probable cause for the search was produced by the "information"—i.e., that the truck smelled of marijuana—provided Donahue by Officer Wyant, who did not testify. As appellant argues, "Donahue himself smelled nothing; Donahue himself observed nothing untoward even though he was right near the vehicle. That was the case apparently even after he had been supplied the information about the smell of marijuana. This in itself casts questions about why the officer—Wyant—who was never seen by Jameson, could, from some unknown vantage

point, determine that a marijuana odor was coming from that vehicle and not another, while an officer within inches of the vehicle could not." The problem for the People, as appellant sees it, is that where, as here, "an officer furnishes to another officer information which leads to an arrest, the People must show the basis for the former officer's information" (*Remers, supra,* 2 Cal.3d at p. 667), and they failed to do so in this case.

The difficulty for appellant is that before Donahue conducted the search, he had been told by Officer Wyant of a marijuana smell emanating from the truck, asked appellant whether the vehicle contained marijuana, and been told by appellant that there were about 20 pounds in the back of the truck. It might have been unnecessary for the trial court to rely on appellant's admission as probable cause to conduct the search because, as we have said, at the time of the suppression ruling the search, which was incidental to a valid detention, was authorized by the then prevailing interpretation of the *Belton* rule. Nevertheless, the court did rely on appellant's admission as a basis upon which to find the search reasonable, and the People now also rely on the admission as eliminating the need for Officer Wyant to take the stand to establish the basis of his belief that appellant's vehicle contained marijuana. In other words, from the People's perspective, there is no *Remers-Madden-Harvey* issue.

Appellant sees the matter differently. His reply brief argues that even if he "himself testified that Donahue had told him that Donahue's partner had told Donahue that he smelled marijuana, that relaying of the statement still does not establish the truth of the statement by Donahue's partner, rather than its being, for instance, the pure imagination of, or an honest but inaccurately founded perception of Donahue's partner. For instance, a rogue officer could regularly make such claims when acting with a partner and convey such information to his partner simply for the purpose of extending a detention which otherwise had been concluded, simply to obtain some possible admission of possession of drugs if even in the smallest and even legal amounts, by confronting the detainee with the question such as posed to Jameson here, although there had been no intimation of anything being amiss up to that point other than a traffic violation for which

Jameson was stopped. This case illustrates precisely the basis for the requirement of in-court confrontation of the officer transmitting, and in this case both providing and transmitting the information."

This barely comprehensible argument completely misses the legally relevant point, which is not "the truth of the statement by Donahue's partner" or whether it is purely the result of the partner's imagination, *but the truth of appellant's admission,* and whether it provided a reasonable basis upon which to conduct the search.

Though it is not entirely on point factually, *In re Jeremy G.* (1998) 65 Cal.App.4th 553, shows that appellant's statement against his own penal interest was presumptively reliable and justified the challenged search. In that case, an officer asked a minor if he was " 'searchable,' " and the minor responded, " 'Yes. For weapons.' " (*Id.* at p. 555.) The juvenile court granted the minor's suppression motion because the minor was not in fact subject to any search condition. Finding the search nevertheless reasonable in the circumstances, the Court of Appeal reversed. As stated by the court, "[t]he minor was 16 years old, and nothing in the record shows he exhibited signs of immaturity or lack of normal intelligence. Given this state of the record, [the officer] could reasonably believe the minor was aware of his legal circumstances and would not make a statement against his interest unless it was true. Indeed, it has long been recognized that statements made against one's interest's, for that very fact, are reliable. (See Evid. Code, § 1230—declaration against interest constitutes exception to the hearsay rule.) Since [the officer] was reasonable in relying on the minor's statement, and therefore entitled to conduct the search, the juvenile court erred in granting the suppression motion." (*Id.* at p. 556.)

So, too, in the present case did appellant's candid admission that he was transporting large amounts of marijuana and money provide probable cause to search his truck. The search was reasonable within the meaning of the Fourth Amendment.

The Detention Was Not Prolonged

As the parties agree, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." (*Florida v. Royer* (1983) 460 U.S. 491, 500.) A traffic stop is unconstitutional if it is " 'extended beyond what is

reasonably necessary under the circumstances which made its initiation permissible.' " (*People v. McGaughran* (1976) 25 Cal.3d 577, 586.) There is no hard-and-fast limit delineating the amount of time that is reasonable; "the reasonableness of each detention period must be judged on its particular circumstances." (*Williams v. Superior Court* (1985) 168 Cal.App.3d 349, 358.)

Appellant's complaint is that although Officer Donahue stated to appellant that Officer Wyant told him he smelled marijuana emanating from appellant's truck, "without the opportunity to challenge, cross-examine, and test Wyant as to his mere *conclusion* that he smelled marijuana and his *conclusion* that it was from Jameson's truck as opposed to another vehicle in the parking lot, there is no way to determine whether Donahue rightfully could rely on it, given he did not smell marijuana, and thus whether there was any legal justification for him to shift gears, question pointedly about marijuana—completely unrelated to the only reason he knew and had reason to detain Jameson, i.e., the traffic violations—and order Jameson out of the vehicle, and subsequent[ly] search the vehicle." (Fn. omitted.)

This longwinded sentence—ostensibly in support of the claim that "[t]he detention was extended beyond the time necessary to deal with the [Vehicle Code] violations of which Donahue was aware"—does not make sense. There *was* a simple and quick way for Donahue to determine whether Wyant's "conclusions" were reliable—namely, to ask appellant if that was the case—which was what Donahue did. Appellant cites no authority in support of his suggestion that, in the circumstances, there was no "legal justification" for Donahue to "question [him] pointedly about marijuana," and we are not aware of any. Although appellant's testimony that Officer Donahue related to him Officer Wyant's statement that appellant's truck smelled of marijuana was not offered for the truth of Wyant's statement, it satisfactorily established justification for Donahue's query whether appellant was transporting marijuana, and the response he received certainly justified Donahue's subsequent search.

Appellant does not challenge the validity of his detention but maintains that, because he was not detained for the commission of a marijuana offense, Officer Donahue

was barred from asking him whether he was transporting marijuana, despite the information he received from Officer Wyant indicating that he was. Appellant cites no authority for this proposition, and we do not accept it. Nor do we agree that an officer who detains a driver for Vehicle Code offenses, or merely in order to warn a driver, cannot conduct a search of the vehicle when subsequently provided reason to think the vehicle might contain marijuana. In *Illinois v. Caballes* (2005) 543 U.S. 405, a state trooper stopped the respondent for speeding and radioed in a second trooper who overheard the transmission, drove to the scene with a narcotics-detection dog, and walked the dog around respondent's car while the first trooper wrote respondent a warning ticket. When the dog alerted at the trunk of the respondent's car, the officers searched the trunk, found marijuana, and arrested the respondent. The Supreme Court upheld the search after concluding that a "dog sniff" conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

The record does not show Officer Donahue detained appellant beyond the time within which it was necessary for him to perform his legitimate investigative function (*People v. Lingo* (1970) 3 Cal.App.3d 661, 664-665), or otherwise failed to conduct his investigation in a "diligent and reasonable manner" (*People v. Williams* (2007) 156 Cal.App.4th 949, 960). He asked appellant for his license and insurance papers almost immediately after stopping him, the record does not indicate he took an excessive amount of time to return to his patrol car to validate those documents, and he asked appellant whether he was carrying marijuana in his truck immediately after he returned. The valid detention was not unduly prolonged.

DISPOSITION

For the foregoing reasons, the trial court did not err in denying appellant's suppression motion. The judgment and sentence imposed are affirmed.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Richman, J.